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Are Professional Sports Leagues Single Entities Incapable of Conspiring in Violation of the Sherman Act?: The Supreme Court Ponders Whether to Decide the Issue in *American Needle v. NFL*

Steven Semeraro[1]

In *American Needle v. National Football League*,[2] a sports clothing manufacturer sued the National Football League ("NFL"). American Needle alleged that an exclusive agreement between the league and Reebok to manufacturer caps with NFL team logos constituted a concerted refusal among the teams in the league violating Section 1 of the Sherman Act. The Seventh Circuit upheld a grant of summary judgment in favor of the NFL on the ground that the league constitutes a single entity incapable of conspiring under Section 1. The NFL, with the support of the National Basketball Association ("NBA") and the National Hockey League ("NHL"), then concurred in American Needle's petition for certiorari to the U.S. Supreme Court.[3] The Court has requested the views of the Solicitor General ("SG)),[4] and is awaiting the SG's brief.

This article reviews the case law assessing the single-entity defense and evaluates the A*merican Needle* decision. Professional sports leagues have long been magnets for antitrust claims, because their rules, policies, and contracts can be viewed as the product of an agreement among independently-owned teams that both play in and direct the league. Popular sports leagues also have substantial power in some markets, because, for loyal fans, there is no reasonable substitute for watching their favorite team. Those who are disgruntled by the actions of a sports league thus have little difficulty couching their grievance as a contract, combination, or conspiracy that triggers Section 1 scrutiny.

From the beginning, sports leagues responded that they are single entities incapable of conspiring under the antitrust laws. Although individual teams are separate businesses that compete on the field of play, the leagues have argued that the teams do not compete in the marketplace. The economic success of each team is fundamentally tied to the prospects of the league as a whole, and thus to all of the other

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[2] 538 F.3d 736 (7th Cir. 2008).

[3] Brief for the NFL Respondents, 2009 WL 164245 (Jan. 2, 2009). The National Basketball Association and the National Hockey League have both filed amicus briefs also urging the Court to hear the case. Brief of Amicus Curiae National Basketball Association and NBA Properties in Support of the NFL Respondents' Response 2009 WL 164243 (Jan. 21, 2009); Brief of Amicus Curiae the National Hockey League in Support of the NFL Respondents, 2009 WL 164244 (Jan. 21 2009).

[4] American Needle v. NFL, 129 S. Ct. 1400 (2009) (Mem.).

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teams. Moreover, the product that the teams produce, a particular brand of sport, is a joint product that no single team could provide. NFL football, for example, includes a rich history and set of traditions, season-long standings, statistical comparisons among players, playoffs, championships, and of course competition between teams on the field. Producing this joint product requires coordination akin to the internal regulations of a single large enterprise rather than agreement among economic rivals.

Over the years, the Supreme Court has offered some observations that could be read to support the single-entity defense. In 1996, in assessing the scope of the non-statutory labor exemption, a majority of the Court recognized in dicta that NFL teams are not ordinary competitors and that in some cases the league is "more like a single bargaining employer."[5] Years earlier, then-Justice William Rehnquist, in a dissent from the denial of certiorari, had emphasized that "the league competes as a unit against other forms of entertainment" and "individual NFL teams . . . rarely compete in the market place."[6]

Despite this hopeful rhetoric, the single-entity defense has met with little success in the lower courts. In the 1970s and early 1980s, the Second, Third, and Ninth Circuits rejected the single-entity defense in cases challenging National Football League rules.[7] In numerous other cases, involving a variety of different sports, the courts applied Section 1 to league decisions without addressing the single-entity issue.[8]

The Supreme Court's 1984 *Copperweld* decision[9] gave the NFL and other sports leagues new hope. There, the Court held that a parent company and its wholly-owned subsidiary were incapable of conspiring under the antitrust laws because they did not constitute independent voices in the competitive marketplace.[10] The parent corporation

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[5] Brown v. Pro Football, Inc., 518 U.S. 231, 248-49 (1996) ("[T]he [teams] that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival").

[6] NFL v. North American Soccer League, 459 U.S. 1074, 1077 (1982) (Rehnquist, J. dissenting from denial of certiorari).

[7] North American Soccer League v. NFL, 670 F.2d 1249, 1257 (2d Cir.1982) (describing single entity defense as a "loophole" that "would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects"); Los Angeles Mem'l Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1389-90 (9th Cir. 1984) (explaining that the necessity of cooperation does not render competitors immune from Section 1 liability); *see* Mid-South Grizzlies v. NFL, 720 F.2d 772, 786-87 (3rd Cir. 1983) (recognizing some economic competition among members of the league); *but see* San Francisco Seals, Ltd. v. National Hockey League, 379 F.Supp. 966, 970 (C.D.Cal.1974) (decision rejected by the Ninth Circuit in *L.A. Memorial Coliseum*).

[8] *See, e.g.*, Radovich v. National Football League, 352 U.S. 445, 449-52 (1957); Mackey v. NFL, 543 F.2d 606, 620 (8th Cir.1976); Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C.Cir.1978); Linseman v. World Hockey Association, 439 F.Supp. 1315, 1321 (D.Conn.1977); Robertson v. National Basketball Association, 389 F.Supp. 867, 890-93 (S.D.N.Y.1975); Philadelphia World Hockey Club Inc. v. Philadelphia Hockey Club, Inc., 351 F.Supp. 462, 500 (E.D.Pa.1972); Bowman v. NFL, 402 F.Supp. 754 (D.Minn.1975); Kapp v. NFL, 390 F.Supp. 73 (N.D.Cal.1974); Levin v. National Basketball Association, 385 F.Supp. 149 (S.D.N.Y.1974); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1061 (C.D. CA 1971).

[9] Copperweld Corp. v. Independence Tube, 467 U.S. 752 (1984).

[10] *Id*. at 771-72.

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could, after all, treat the subsidiary as a division of the same company, which, of course, would be a single entity incapable of conspiring with itself. Antitrust analysis, the Court emphasized, must turn on economic realities, not corporate formalities. Because the parent has the power to completely control its wholly-owned subsidiaries' conduct, only a single entity exists for antitrust purposes.

In several post-1984 cases, a variety of sports leagues have cited *Copperweld* for the proposition that formally separate entities may be incapable of conspiring under the antitrust laws when those entities are all working toward a common end. To be sure, the teams are not subsidiaries of the league. But they sell a single product, akin to independently owned McDonald's franchises that all sell a standardized product. No one would expect those franchises to compete with one another in introducing new sandwiches and, the leagues have argued, the same is true of sports teams.

Just as the parent company and its subsidiaries all seek to earn profits for the same group of shareholders, the teams in a sports league seek to make the league a more effective competitor with other forms of entertainment. The classic, perhaps overbroad, list of competitors for a typical sports league includes other leagues playing the same sport, other sports, "and other entertainment such as plays, movies, opera, TV shows, Disneyland, and Las Vegas."[11] Far from placing limits on the agreements teams may reach, one court wrote in paraphrasing the league's argument, "antitrust law permits, indeed encourages, cooperation inside a business organization . . . to facilitate competition between that organization and other producers."[12]

Sports leagues, however, differ from parent and subsidiary companies in a significant way. A parent company is the single marketplace voice that ultimately controls the activities of all of its subsidiaries, and those junior companies must abide by the dictates of their parent. In a sports league, by contrast, the individual teams both control the decisions of the league and retain the right to secede and create a competitive league. Rather than a central authority that governs its sub-parts, the real power in a sports league rests with the individual team owners.[13]

Perhaps because of this distinction, most post-*Copperweld* decisions have continued to reject the single-entity defense.[14] That the teams have business interests that differ from those of the league, however, may not entirely rule out single-entity status. In a mid-1990s case that remains the definitive opinion on the issue, renowned antitrust

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[11] Chicago Prof. Sports Limited v. NBA, 95 F.3d 593, 597 (7th Cir. 1995) (per Easterbrook, J.) ("*CPS*").

[12] *Id*. at 598.

[13] Fraser v. Major League Soccer, 284 F.3d 47, 57 (1st Cir. 2002); *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1389.

[14] *Fraser*, 284 F.3d at 55-59; Sullivan v. NFL, 34 F.3d 1091, 1099 (1st Cir.1994); National Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 469-70 (6th Cir. 2005); McNeil v. NFL, 790 F.Supp. 871, 879-80 (D. Minn. 1992), *but see* Seabury Management, Inc. v. PGA of America, Inc., 878 F.Supp. 771, 77-78 (D.Md.1994), *affirmed in relevant part*, 52 F.3d 322 (4th Cir.1995) (holding Professional Golf Association and its separately incorporated sections to be a single entity).

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expert Frank Easterbrook explained that differing interests exist even within a single corporation. One division, for example, can often benefit at the expense of another.[15] The key is not differing interests but whether a business arrangement reduces the number of independent marketplace decision-makers without the countervailing "efficiencies that come with integration inside a firm."[16] In *Copperweld*, Easterbrook concluded, the Supreme Court treated parent companies and wholly-owned subsidiaries as single entities because they are likely to generate the same sort of efficiencies as a single integrated company.

Ultimately, Easterbrook never decided whether sports leagues generated similar efficiencies. In a case involving whether the National Basketball Association could limit an individual team's ability to televise games, he remanded for further examination of the structure of the relevant market. His analysis began with a confusing double negative: "We see no reason why a sports league *cannot* be treated as a single firm . . . . It produces a single product; cooperation is essential . . .; and a league need not deprive the market of independent centers of decision making."[17] He then presented his most important insight, recognizing that whether a league should be treated as a single entity turns on the nature of competition allegedly restrained, rather than solely on the structure of the league itself.[18]

For example, a sports league is almost certainly a single entity with respect to rules that govern the teams on the field of play. Without agreement on these rules, the product could not exist at all and thus the efficiencies and benefits of agreements among the teams on the rules of play surely outweigh any competitive loses. By contrast, from the perspective of a college basketball player looking toward a career as a professional, independent decision-making by the teams in the league takes on significantly greater competitive importance. An agreement prohibiting rivalry among teams to sign players would restrain the independent marketplace voices competing for the most talented players.

Although Easterbrook thought that the NBA was almost certainly entitled to set limits on individual team broadcast rights, he refrained from pronouncing the league a single entity for that purpose. Instead, he suggested that drawing the line between undertakings properly viewed as unilateral and those that are conspiratorial may not be worth the candle. "[G]iven the difficulty of resolving [the single entity] issue," he wrote, "it may be superior to approach [a sports league case] as a straight Rule of Reason case."[19]

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[15] *CPS*, 95 F.3d at 598.

[16] *Id*.

[17] *Id*. at 598-99.

[18] *Id*. at 599 (explaining that "[t]o say that the league is 'more like a single bargaining employer' than a multi-employer unit is not to say that it necessarily is one, for every purpose").

[19] *Id*. at 601.

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Seven years later, another leading antitrust expert, Judge Michael Boudin came to the same conclusion in a case involving Major League Soccer's limit on player salaries. In an opinion for the First Circuit, he explained that "[o]nce one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point . . . . To the extent the criteria reflect judgments that a particular practice in context is defensible, assessment under section 1 is more straightforward and draws on developed law."[20] Both jurists thus reached the same conclusion: A court may as well apply the rule of reason in a sports league case, because the analysis of the nature of competition in the relevant market that is necessary to determine whether a league should be treated as a single entity is essentially the same as the court would conduct to determine if the alleged restraint harmed competition.

In *American Needle, Inc. v. National Football League,*[21] the Seventh Circuit abandoned this cautious approach, holding that: (1) the NFL is a single entity for the purposes of licensing rights to produce caps with team logos, and (2) the league's decision to issue an exclusive license to manufacture those caps could not be challenged under either Section 1 or Section 2 of the Sherman Act.

Although Judge Kanne's opinion for the court in *American Needle* purports to recognize that each competitive practice must be analyzed separately to determine whether the league properly constitutes a single entity with respect to that practice, he ignores the more important aspect of Easterbrook's and Boudin's earlier analyses. Rather than employ the rule of reason to inform the single-entity inquiry, the *American Needle* decision used the single-entity defense to side-step any meaningful competitive analysis of the market for clothing bearing NFL team logos.

First, Judge Kanne claimed that the NFL had to be a single source of economic power because a single team could not produce the product, *i.e.* professional football games. "Asserting that a single football team could not produce a football game," he quipped, "is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?"[22] From this truism, he concluded that "[i]t thus follows that only one source of economic power controls the promotion of NFL football; it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football."[23]

To the extent that this analysis makes any sense at all with respect to logo cap sales, it sweeps way too broadly. One simply cannot conclude that the need for standards to produce a sports league's primary product, NFL football, renders competition unnecessary with respect to ancillary products sold by the teams, such as

[20] *Fraser*, 284 F.3d at 59; *Sullivan* , 34 F.3d at 1099.
[21] 539 F.3d 736 (7th Cir. 2008).
[22] *Id*. at 743.
[23] *Id*.

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logo caps. The *NCAA* football telecasts case made this point abundantly clear.[24] Universities had to agree on many rules to make NCAA football possible, but the schools could nonetheless compete on licensing television rights, and Section 1 of the Sherman Act required them to do so. Easterbrook carefully distinguished the NBA from the NCAA,[25] and even then refused to pronounce the NBA a single entity. By contrast, Judge Kanne never explains why the NFL's licensing of logo caps is different from the NCAA's licensing of football telecasts.

Second, Judge Kanne relied on "uncontradicted evidence that the NFL teams share a vital economic interest in collectively promoting NFL football" and must compete against other forms of entertainment.[26] But that was true of NCAA football, and would also apply to any group of competitors fixing prices. As the Ninth Circuit recognized in one of the first cases rejecting the single-entity defense, cartel members always share a vital interest in promoting their own products to better compete with those outside the cartel.[27] And any group of competitors will share a common interest in minimizing competition among the members of the group. That fact alone hardly eliminates the need for Section 1 scrutiny.

Finally, and "most importantly," Judge Kanne asserted, the NFL has licensed its intellectual property through NFL Properties, a single entity, for more than 40 years.[28] Presumably realizing that the length of an anticompetitive agreement cannot change its effect, the court focused on NFL Properties' articles of incorporation, which say that it was created to promote the NFL. And promoting ones product, the court concluded, is obviously a good thing.

Again, the reasoning sweeps too broadly. The *American Needle* case was not about promoting NFL Football, *per se*. It dealt with selling merchandise bearing team logos. Although a unified approach to purchasing magazine and television advertising promoting NFL Football might well be performed most efficiently by a single entity that could effectively coordinate the impact of the various media buys in the context of a very competitive advertising market, selling logo caps is another story entirely. Each NFL team very likely has market power in a sports logo cap market, because each team could readily charge well above the marginal cost, plus normal profit, of producing a cap bearing that team's logo.

The exclusive license attacked in *American Needle* allows the NFL teams to exploit collectively each team's power by eliminating competition from the closest substitute products, *i.e.* logo caps from other NFL teams. Fans wishing to purchase an NFL logo

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[24] Board of Regents v. NCAA, 468 U.S. 85 (1984).

[25] *CPS*, 95 F.2d at 600.

[26] *American Needle*, 539 F.3d at 743.

[27] Los Angeles Mem'l Coliseum Comm'n, 726 F.2d at 1389 ("Although the business interests of League members will often coincide with those of the NFL as an entity in itself, that commonality of interest exists in every cartel.")

[28] *Id*. at 744.

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cap will have only a single choice of cap brand, presumably at a high price. No team may compete to capture additional cap sales by also licensing its logo to another cap manufacturer that could produce lower cost products or a greater variety of designs and features. Cap output is almost certain to be lower with a single exclusive license than it would be if each team licensed its own logos to different cap manufacturers.

In the NBA television licensing case, one could argue that an individual team might not fully internalize the negative effects that over-saturation of the airwaves could have on the marketability of NBA games on television, particularly given the substantial competition from other sports and non-sports programming. Limiting the individual teams' ability to televise games locally might thus have been a legitimate decision in the interest of the league as a whole.

A number of critical questions must be answered before drawing a similar conclusion about the NFL and logo cap sales. Would over-saturation or poor quality really hurt the NFL in any substantial way that would not be internalized by an individual team licensing its logo to a lower cost cap producer? Do NFL logo caps face the same level of outside competition as NBA basketball telecasts? By simply declaring the NFL a single entity, the *American Needle* court side-stepped what should have been the critical questions. Questions that, as Easterbrook and Boudin counseled, are most readily answered within the confines of a rule-of-reason inquiry under Section 1 of the Sherman Act.

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